

Special Education Due Process Hearing Decision
Parent v. Brunswick

October 1, 1998

CASE NO: 98.103

REPRESENTING THE PARENT: James Breslin, Advocate, Maine Department of
Mental Health, Mental Retardation and Substance
Abuse Services

REPRESENTING THE SCHOOL: Amy Tchao, Esq.
Drummond, Woodsum and McMahon

HEARING OFFICER: Carol B. Lenna

This hearing was held and the decision written pursuant to Title 20-A, MRSA, 7207 et. seq., and 20 USC 1415 et. seq., and accompanying regulations.

Parents filed a request for due process hearing on behalf of their son on July 21, 1998. Through a Settlement Agreement signed on August 21, 1997, the school agreed to place the Student at the Southern Maine Learning Center in Portland, Maine, for the 1997-98 school year. The PET convened on June 1, 1998 to consider the Student's program for the 1998-99 school year. Unable to agree on program and placement for the coming year, the parent requested a due process hearing. The parties met in a prehearing conference on August 13. The parties disagreed about the "stay put" placement for the Student during the pendency of the process. The parties filed arguments on this matter with the hearing officer on August 20. The hearing officer issued a ruling on August 28 identifying the public school as the "stay put" placement for the remainder of the administrative and subsequent judicial proceedings. That ruling is appended to this decision.

The hearing initially convened on August 20, 1998. At the suggestion of the parents' advocate the parties met privately for over two hours and drafted an agreement to resolve the current dispute. The parties then reconvened before the hearing officer and announced that there was agreement between the parties and the parent was withdrawing the request for hearing. On August 21 the parent contacted the hearing officer to say that she wished to set aside the agreement and proceed to hearing. The school objected to the hearing going forward and asked the hearing officer in a written argument to dismiss with prejudice. After considering the school's argument, the hearing officer went forward with the hearing. The hearing convened on September 8 and 9, 1998. The parties introduced 104 documents into the record. Eight witnesses gave testimony. The record remained open until September 16 for the submission of written summations. Following is the decision in this matter.

I. Background Statement

The case involves a xx year old student, identified as eligible for special education services under the category of "multi-handicapped". He has a history of learning difficulties resulting from a learning disability and associated social/behavioral issues. The student was enrolled in the public school through his seventh grade year. In August 1997, the parent and the school signed an agreement which resulted in the student being placed at the Southern Maine Learning Center (SMLC) in Scarborough, Maine, for his eighth grade year. The PET met in June 1998 to plan for the 1998-99 school year. The proposed IEP returned the student to the public high school for the 1998-99 school year.

It is the position of the parent that, for the first time in his school career, the student made significant gains while at the Southern Maine Learning Center. The parents reject the IEP as failing to offer the student an appropriate education on both procedural and substantive grounds. They argue that the school had predetermined his program and placement prior to the PET meeting, that the IEP was not developed by the PET and that they, as parents, had little input into the student's program.

It is the position of the school that that the placement at the SMLC was a temporary placement, giving the school the 1997-98 school year to transition the student back to the public school. They argue that they have offered to schedule a number of follow-up meetings since the June PET to discuss program issues and solicit the family's input. They argue that the program at the high school is specifically tailored to meet the student's educational needs and includes the service components necessary to meet his learning needs while providing him access to the general education curriculum. The school asserts that the proposed program provides the student with a program which is reasonably calculated to provide him with educational benefit in the least restrictive environment.

In addition to the issues for hearing and the procedural violations raised by the parents, the parties were in disagreement as to what constitutes "the stay-put placement" for the student during the hearing process. It is the position of the parent that the last educational placement ordered by the PET was the SMLC, and that placement remains his "current educational program" for the purpose of "stay put" during the pendency of these proceedings. It is the position of the school that the placement at the SMLC was through settlement agreement only and was, by agreement of the parties, for the 1997-98 school year only. The "stay put" placement in the opinion of the school is at the public school.

The hearing officer ordered the parties to submit written arguments regarding this disagreement by August 20. The hearing officer issued a written ruling on August 28 identifying the public school as the "current education placement" until the conclusion of these and subsequent proceedings.

II. Issues of the Hearing

- Is the IEP proposed by the school reasonably calculated to provide the student with educational benefit in the least restrictive educational environment?
- If not, is an out of district placement required to provide the student with educational benefit?

In addition to these substantive issues, the parents allege the following **procedural violations** occurred in the development of the IEP:

- Placement was determined outside the PET process.
- The parent was excluded from the IEP process.
- The IEP was drafted outside the PET process.

III. Findings of Fact

1. Testing conducted in August 1997, using the Woodcock Johnson-Revised Psycho-Educational Battery of aptitude and achievement, revealed that the student's "broad cognitive ability is in the very low range, suppressed by significant weaknesses in auditory analysis, rapid accurate processing of visual symbols, cognitive language development and short term memory. These weaknesses appear to be causing a lack of development of phonological awareness... Weaknesses in cognitive language development imply that [the student] cannot sort essential from non-essential information. This weakness can effect formal learning in reading, spelling, thinking, and subject matter vocabulary understanding... It should be noted that [the student]'s basic language skills development is within the average range and that logical thinking skills are well developed." Test scores ranged from the very low to the average range. (Exhibit 58)
2. Testing conducted in May 1998, using the same test instrument, showed some increase in standard scores in eleven out of fourteen sub-tests, with significant increases shown in three sub-tests: Long-term Retrieval, Fluid Reasoning, and Reading Comprehension. Decreases in scores were seen in three sub-tests: Visual Processing, Math Calculation and Problem Solving, and Writing Samples. (Exhibit 45)
3. The student began classes at the Southern Maine Learning Center (SMLC) at the beginning of the 1997-98 school year as the result of a settlement agreement between the parent and the school. SMLC is a private day school for learning disabled students. His program there consisted of reading, writing and math remediation, as well as pragmatic language, Maine history, science, martial arts and applied arts. Staff at the SMLC note that, while the

student had good days and bad days, generally he showed progress in all subject areas except written language. (Exhibit 4-23; Testimony Brunnell)

4. The parties a signed Settlement Agreement in August 1997, which stated in part, "...the School Department will order temporary placement of [the student] at the Southern Maine Learning Center...only through the end of the 1997-98 school year,, with... a determination made at that time regarding [the student]'s program and placement for the 1998-99 school year... The purpose of this temporary placement is to use the 1997-1998 school year to effectively transition [the student] from the junior high school to the...high school for the 1998-1999 school year. It is fully the intent of the parties to this Agreement that [the student] will return to the ...Public School System as a ninth grader for the 1998-1999 school year and that the placement at the Southern Maine Learning Center for next year is a temporary placement only." (Exhibit 66)
5. During the spring of 1998 the school began to develop a self-contained program appropriate for ninth grade students with significant learning disabilities. (Testimony Dalrymple, Crowell)
6. The PET met on June 1, 1998 at the SMLC to review the student's progress during the previous year and develop program plans for the coming year. Attending this meeting were: the parents, the Director of Special Services of the public school, a regular education teacher from the public school, a special education teacher from the public school, the student, a teacher from SMLC, the Director of Instruction of SMLC, and the Superintendent of SMLC. (Exhibit 31)
7. The PET reviewed the recent testing conducted by SMLC and progress in his classes there. The team discussed the student's needs and drafted elements of the IEP. School staff reviewed various aspects of the new program being developed at the high school. The PET determined that the student's IEP would be implemented in the public high school. (Exhibit 31-33; Testimony Brunnell, Dalrymple, Crowell)
8. At the conclusion of the PET the parents stated that they wished more time to consider the program being proposed. (Exhibit 33; Testimony parent)
9. The final written copy of the IEP was mailed to the parent on June 10, 1998. The IEP lists the student's strengths, the student's needs and parental concerns regarding programming. Present levels of educational performance are given. Annual goals include improving math performance, written language skills, improving phonological skills, and maintaining passing grades in general curriculum subjects with modifications. Instructional objectives are written for each annual goal. The IEP makes note of behavior concerns which interfere with the student's learning and

acknowledges that a behavior plan is needed. Modifications to accommodate progress in the general curriculum are listed. (Exhibit 34-39)

10. On June 15 the parent met with the director of special education to discuss the student's program in more detail. In letters dated June 16 and July 7, the school invited the parent to meet with school staff to discuss the proposed program and her concerns. On August 12, the parent met with the special education teacher and the assistant principal of the high school. In a follow up letter to the parent the school stated they "would like to set up a PET as soon as possible to make any changes or additions to [the student]'s IEP...prior to the beginning of school." A letter to the parent, dated August 13, enumerates additional program elements requested by the parent that the school incorporated into the program. (Exhibit 1, 28, 29, 73¹, 90; Testimony Crowell, Borowick, Dalrymple)

11. The classroom in which the school proposes to implement the student's IEP will consist of four core curriculum subjects: English, Science, Global Geography, and Math. The program teacher will meet with each general education teacher weekly to assure that key concepts and the content of the curriculum are addressed. Materials will be used from the general education courses, and modified as appropriate. Supplemental materials will be incorporated into student's individual instructional programs, as needed, to meet IEP goals and objectives. Student Portfolios and assessment tools identified in individual IEPs will be used to document progress toward skill mastery and meeting individual objectives. The guidance counselor and the speech-language pathologist will consult with the program staff, and provide direct small group and individual services to students as appropriate. Students will attend other classes as determined in their respective IEPs. Remediation instruction will be given to students as determined appropriate and as identified in individual IEPs. Students will be full participants in all other regular school activities with access to all school resources. (Exhibit 2; Testimony Dalrymple, Crowell, Worthley, Borowick)

¹ Parent's Exhibit 73 is a summary of the August 12 meeting, written by the parent. Only the parent and the teacher are listed as participants at the meeting. However, the assistant principal testified at the hearing that she, too, attended the meeting.

IV. Conclusions

The Individuals with Disabilities Education Act (IDEA) requires that local schools provide students identified as disabled with a “free appropriate public education” which is described in the student’s “individualized education program” (IEP). [20 USC §1412(a)(1)(A), §1413(a)(1), §1414(d)(A)] The IDEA further requires that “[t]o the maximum extent appropriate, children with disabilities...are educated with children who are not disabled...” [20 USC § 1412 (a)(5)(A)]

The standard for a “free appropriate public education” is defined as a program which is “reasonably calculated to enable the child to receive educational benefit”. (*Board of Education v. Rowley*, (3 IDELR 553:656, 667 [1982]) The court made clear that “educational benefit” was not synonymous with “maximum” benefit. (*Id.* at 666) Therefore, if a program is determined to be reasonably calculated to enable the child to receive educational benefit, and provides the maximum opportunity appropriate for the child to participate with non-disabled children, the program is considered appropriate to meet the needs of the student.

The program described in the IEP offered to the student in this case meets that test. The evidence and testimony support the finding that the school has proposed a program which is reasonably calculated to provide the student with educational benefit. In addition, the IEP meets the renewed intent of the 1997 amendments to the Individualities with Disabilities Education Act (IDEA) that students have the opportunity to make progress in the general education curriculum, and have the opportunity to participate in extracurricular and other nonacademic activities, and be educated with non-disabled peers to the maximum extent appropriate.

The IEP proposed by the school contains a statement of the student’s present levels of educational performance. These statements accurately reflect the student’s present educational status as described by evaluative and anecdotal information in the record. The IEP contains measurable annual goals and short-term objectives which are directly related to the present levels of performance and stated needs of the student. Staff who will implement the IEP have devised instructional methodology and instructional strategies which will be employed to meet the goals and objectives contained in the IEP. The methodologies and strategies chosen by the school have been found to be appropriate to the learning needs of students such as the one in this case. The IEP contains a description of the special education and related services to be provided to the student. The IEP contains an explanation of the extent to which the student will participate with non-disabled students.

The parent expresses a preference for the private day school. She argues that the day school should be ordered for a second year because the student made significant gains there. There was no dispute that test scores indicate the

student made significant gains in some areas while at the day school.² However, there was no evidence presented to support the assertion that the program at the day school is so unique that it is the only setting in which the student will make progress. Likewise, evidence did not support the parent's claim that the day school was superior because the student/teacher ratio was lower than that proposed in the school program. Evidence did not support that the student could only make reasonable gains when taught in a specific student/teacher ratio. There was ample evidence that the public school program has the capacity to apportion student/teacher ratio based upon the need of the student. There was no evidence that the staff of the day school found the teaching methodologies proposed by the public school to be unacceptable to a student with significant learning disabilities³.

An "appropriate" program is a program that offers the student meaningful educational benefit in the least restrictive educational environment. Testimony at the hearing supports the finding that the program offered by the public school provides that opportunity. There is no requirement under special education law that a student be placed in the program in which he would make the most gains. The fact that the student might make gains at a greater rate in the day school does not suggest that the student will fail to make gains at an acceptable rate in the public school. The First Circuit has considered this very problem and concluded that

The IDEA does not promise perfect solutions to the vexing problems posed by the existence of learning disabilities in children and adolescents. The Act sets more modest goals: it emphasizes an appropriate, rather than an ideal, education: it requires an adequate, rather than an optimal, IEP. Appropriateness and adequacy are terms of moderation. It follows that, although an IEP must afford some educational benefit to the handicapped child, the benefit conferred need not reach the highest attainable level or even the level needed to maximize the child's potential. See Rowley, 458 U.S. at 198, 102 S. Ct. at 3046-47; Roland M., 910 F.2d at 992.

[Lenz v. Portland School Comm., 998 F.2d 1083 (1st Cir. 1993)]

² The IEP from SMLC is entered into the record at Exhibit 52-56. However, there is no information on the document, and no testimony was offered, to assess the student's progress toward meeting the stated goals in the IEP.

³ The parent testified at the hearing that staff of the day school warned her that she should be very concerned with the program being offered by the public school. However, during testimony at the hearing the day school staff stated they had no opinion about the public school program, and could not comment on the appropriateness of the proposed IEP.

There is no dispute that the student's learning disabilities are significant. The school recognizes that fact and offers a program designed to address those learning problems. There is reason to believe that the service array and the instruction described in the IEP will result in the student's achieving educational benefit while allowing him to progress in the general education curriculum in a regular high school setting. It is the conclusion of this hearing that the IEP proposed by the public school is reasonably calculated to provide the student with educational benefit in the least restrictive environment. Evidence does not support the parent's claim that the student requires placement in the more restrictive setting of a private school in order to receive an appropriate program.

Has the school violated procedures?

There is no evidence to support the parent's contention that "procedural inadequacies compromised the student's right to an appropriate education or seriously hampered the parent's opportunity to participate in the formulation process or caused a deprivation of educational benefits".⁴ Placement was not determined outside the PET process. The parent was not excluded from the IEP process. The IEP was not developed outside the PET process.

The school came to the PET meeting in June with a program concept for ninth grade students with significant learning disabilities. This program was designed to provide the concentrated instructional support required of severely learning disabled students while providing access to the benefits of a public high school. The school proposed this program as appropriate setting in which to implement the student's IEP. It is the parent's claim that this constituted a predetermination of placement, and, therefore, renders the school's IEP fatally flawed, and as such is sufficient reason to find the proposed IEP inappropriate.

Evidence does not support this claim. The parents entered into an agreement which obtained placement for the student at SMLC for a year, and then directed the school to "use the 1997-98 school year to effectively transition [the student]...to the high school setting". The parent, through her attorney, now asserts that the school has focused only on "placement" and has violated the procedural integrity of the process by predetermining the program in which the student would be educated⁵. This argument is advanced in the face of an agreement which calls for the school to spend a year developing a program for the student. To now assert that the school's compliance with its agreement with the parent somehow constitutes a violation of the process is artful, at best.

The fact that the school began efforts to design a new program which would be appropriate to meet the needs of the student and presented the outline of that

⁴ See parent's summary argument, page 7, quoting Roland M., 910 F.2d 983, 994(1st Cir 1990)

⁵ Evidence shows that the "placement" of the student at SMLC occurred by agreement of the parties, not an IEP decision. A new IEP describing his program there was not written until the student had been in the program for almost 6 weeks.

program at the PET is not a violation of the PET process. Schools have an affirmative responsibility to plan for the students within their district. This student was not new to the school. His educational profile was not new to the school. It was reasonable for the PET to assume that the student's IEP could be appropriately delivered within this new program.

Evidence shows that the PET discussed the student's educational strengths and weaknesses, his past education program goals, teaching strategies used by the day school, and the goals for the coming year. The IEP components were discussed at the meeting and major portions were developed at the meeting. The objectives were written later by the special education teacher who was to provide the major part of the student's program. The teacher testified that these objectives were drawn from the IEP from the 1997-98 school year. Regulations do not require that the actual words and phrases of an IEP be written at the meeting. To complete the final writing phase of the IEP document outside the PET is not a violation of regulations, nor does it compromise the procedural integrity of the process.

Evidence does not support the parent's contention that she was excluded from the process. The parent attended the June 1 PET meeting. Testimony at the hearing revealed that the PET meeting was lengthy, that the student's current program and current strengths and weaknesses were discussed by both the private and public school participants, and that the parent had equal opportunity to participate in the discussions. As the program at the high school continued to coalesce over the summer, the school made repeated efforts to meet with the parent to allay any concerns. The school made efforts to understand what the parent felt was lacking in the program and to integrate components into the IEP to address specific concerns the parent raised.

On August 20, 1998, the day the hearing was initially to have begun, the parent's advocate requested the parties meet privately before the hearing started. The hearing officer granted this request. Two and a half hours later the parties came back reporting that they had come to resolution. The parent stated she was withdrawing the hearing request. The parent waived her right to seven day notice, and the parties set up a date for the PET to convene and incorporate additional elements into the IEP. The parent recanted the next day and the hearing went forward. The school elected to proceed with the PET on August 27, knowing the parent was planning not to attend. The school offered both the minutes of the PET and the IEP changes into the hearing record, as well as the draft of the failed agreement. The parent objected to the admission of these documents.

This dispute has, from the beginning, centered around the parent's claim that the school has failed to involve her in the process of developing her son's IEP. She asserted that the elements of the program proposed by the school were vague to her and that the school was acting independently to design the program. She

asserted that she had had little influence over the services which would be provided to meet her son's needs. As the hearing progressed, the parent continued to assert the claim that the school had failed to provide her with sufficient input into the IEP development. The school's agreement to the items identified at the August 20 meeting⁶, and the school's efforts to memorialize these items into the student's IEP, does not support that claim. The school should not have convened the PET on August 27, over the objections of the parent during the pendency of a hearing. However, the action of the participants of that meeting make it clear that the school's continues to be open and willing to modify the student's program to address the continued concerns of the parent. The hearing officer allowed these documents to become part of the record.

At the heart of this case is a settlement agreement entered into by the parties in August 1997. The language in this agreement is clear. The school agreed to place the student at the private day school "only through the end of the 1997-98 school year". At the end of that year the PET was to meet and make plans to develop an IEP for the 1998-99 school year. The agreement states "[i]t is fully the intent of the parties to this Agreement that [the student] will return to the...Public School System as a ninth grader for the 1998-99 school year". The agreement was based on the assumption that the school would use the year to design a program which could meet the student's needs in the high school. The school spent the spring of 1998 designing a new program which was conceived with the student in mind. The parent rejected the program and requested a hearing.

When the hearing began the parties were in dispute regarding the "stay put" provision for the student pending the outcome of the process. The parent asserted that the "current educational program" was the private school and that the student should be maintained there at public expense during the pendency of the proceedings. The parent argued that "nothing in the [settlement] agreement locks [the student] into coming to...[the] High School for the upcoming year". The hearing officer through a memorandum to the parties rejected that argument. The hearing officer found that the parties "otherwise agree[d]" through the Settlement Agreement of August 1997 that the public school program was the "current educational placement" for the 1998-99 school year. Therefore, the "stay put" during the pendency of the hearing and any subsequent proceedings is the program proposed by the school at the high school.⁷

Clearly, the parent wishes her son to remain at the day school. It is her right and privilege as a parent to advocate for those things she feels best serve her son. However, the evidence supports that the student's educational needs can be met in the public school. If the student continues at the private school, it should not be at public expense.

⁶ Although the parent did not sign the Agreement drafted on August 20, she testified that the items included in the document, Exhibit 96-99, accurately reflects what was agreed to.

⁷ The full text of this memorandum is appended to this decision.

III. Order

The school shall convene the PET within 15 days of the receipt of this decision. The school and the parents should invite other participants to this meeting who have been involved with the student to participate in making the final program decisions for the 1998-99 school year. The IEP shall reflect any additional program changes made at this meeting. The IEP shall be implemented in the Freshman Transition program at the public high school.

Carol B. Lenna, Hearing Officer